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No. 454

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO
A Partnership, Trading as Territo & Sons
and
CALTEX PETROLEUM CO., INC., A Corporation,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1958

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO
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CALTER PETROLEUM CO., INC., A Corporation,
Appellants,

v.

UNITED STATES OF AMERICA and
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Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

OPINION BELOW.

This appeal is from the opinion and final order of the three-judge statutory court of the United States District Court for the District of New Jersey in the above-entitled case which opinion and order were rendered and filed on June 6, 1958. A copy of said opinion and order is attached hereto as Appendix "A".

JURISDICTION

This appeal is taken pursuant to the provisions of 28 U.S.C. §1253. The opinion and order of the three-judge statutory court of the United States District Court for the District of New Jersey, entered on June 6, 1958, dismissed the complaint of the appellants herein for an order to enjoin the United States and the Interstate Commerce Commission from proceeding any further with investigations in Dockets No. MC-C-2039 and MC-C-2040, and to annul and set aside in their entirety the orders of the Interstate Commerce Commission dated October 3, 1956, February 11, 1957 and October 25, 1957, in the matter of Territo & Sons, a partnership — Investigation of Operations, Docket No. MC-C-2039, and in the matter of Calter Petroleum Co., Inc. — Investigation of Operations, Docket No. MC-C-2040, for want of jurisdiction.

In this proceeding, appellants are requesting the Court to determine, as a matter of law, that the Interstate Commerce Commission is without jurisdiction to institute investigations of private carriers under Section 204(c) of the Interstate Commerce Act or under any other section of the Act unless said investigation is directed solely to an issue pertaining to qualifications and maximum hours of service of employees, and standards of equipment of a private carrier.

The judgment sought to be reviewed was dated and entered on June 6, 1958. The notice of appeal to the Supreme Court of the United States was filed with the United States District Court for the District of New Jersey on August 6, 1958. The date for filing this jurisdictional statement was extended to October 16, 1958, by order of the United States District Court for the District of New Jersey, which order has previously been filed with this Court.

Title 28 U.S.C. §1253 is the statutory provision believed to confer on this Court jurisdiction of the appeal. Said section provides as follows:

"Except as otherwise provided by law, any party

> may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Title 28 U.S.C. §2325 is the Act of Congress which required the proceeding in the United States District Court for the District of New Jersey, supra, to be heard and determined by a District Court of three judges. 28 U.S.C. §2325 provides that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Among the cases believed to sustain the jurisdiction of the Supreme Court of the United States on this appeal include, among others, the following:

> *Radio Corp. of America* v. *United States*, 95 F. Supp. 660, Affirmed 71 S. Ct. 806, 341 U. S. 412, 95 L. Ed. 1062.
>
> *U. S.* v. *Hancock Truck Lines, Inc.*, 65 S. Ct. 1003, 324 U. S. 774, 89 L. Ed. 1357.

QUESTIONS PRESENTED BY THE APPEAL

The questions presented by this appeal are as follows:

1. Whether the Interstate Commerce Commission has authority under Section 204(c) or under any other section of the Interstate Commerce Act to institute investigations of private carriers with a view to determining whether they have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as a common

or contract carrier by motor vehicle in violation of Section 206(a)(1) or 209(a)(1) of said Act.

2. Whether the three-judge statutory court erred in dismissing, for want of jurisdiction, the complaint for an order to enjoin the United States and the Interstate Commerce Commission from proceeding any further with the investigations in Dockets No. MC-C-2039 and MC-C-2040, and to annul and set aside in their entirety the orders of the Interstate Commerce Commission dated October 3, 1956, February 11, 1957 and October 25, 1957, in the matter of Territo & Sons, a partnership — Investigation of Operations, Docket No. MC-C-2039, and in the matter of Calter Petroleum Co., Inc. — Investigation of Operations, Docket No. MC-C-2040, for want of jurisdiction.

CONCISE STATEMENT OF THE CASE

On and prior to December 3, 1956, and continuously since that date, the appellants have been engaged in the fuel oil business by providing heating fuel and related services for their customers. In delivering their products to their customers, appellants operate as private carriers of property by motor vehicle as defined in Section 203(a)(17) of the Interstate Commerce Act. As such private carriers, the Interstate Commerce Commission has jurisdiction over the appellants only with respect to matters relating to qualifications and maximum hours of service of employees, and standards of equipment. This restrictive jurisdiction over private carriers appears in Section 204(a)(3) of the Interstate Commerce Act which provides that:

> "To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term

> 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 204(c); 205; 220; 221, 222(a), (b), (f), and (g); and 224."

Under date of October 3, 1956, the appellants were named respondents in two investigations proceedings instituted by the Interstate Commerce Commission under Section 204(c) of the Interstate Commerce Act with a view to determining whether they (appellants) have been engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of Section 206(a(1) or 209(a)(1) of the Interstate Commerce Act.

Under Section 204(c) of the Interstate Commerce Act, the Interstate Commerce Commission does not have authority to institute investigations of private carriers with respect to any matters other than those pertaining to qualifications and maximum hours of service of employees, and standards of equipment. As heretofore indicated, Section 204(a)(3) of the Interstate Commerce Act specifically limits the jurisdiction of the Interstate Commerce Commission under Section 204(c) to instituting investigations of private carriers only insofar as qualifications and maximum hours of service of employees, and standards of equipment are concerned. In dismissing the complaint for an injunction against the Interstate Commerce Commission, the three-judge court erroneously concluded that:

> "We have here an attempt to raise in a statutory three judge court in advance of administrative action a question of administrative jurisdiction which such a court is competent to consider only if and after decision shall have gone against the aggrieved parties on the merits in the administrative tribunal. We emphasize that jurisdictional questions like all other can be preserved for review at that time. But the matter is clearly not ripe for judicial intervention now." (App. A — p. 11).

Such conclusion brings into focus the crux of the questions raised on this appeal. In other words, if the Interstate Commerce Commission has no statutory authority to institute investigations of private carriers pertaining to matters other than qualifications and maximum hours of service of employees, and standards of equipment, it should be permanently enjoined from conducting any other type of investigation until such time as it receives authority under an Act of Congress.

SUBSTANTIAL QUESTIONS PRESENTED REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR THEIR RESOLUTION.

Questions raised on this appeal relate to the extent of the authority vested in the Interstate Commerce Commission by the Interstate Commerce Act, which is an Act of Congress as amended from time to time. This case does not involve solely the question as to whether the Interstate Commerce Commission should be permitted to hold hearings in the aforesaid investigation proceedings before the parties adversely affected may seek judicial review of the actions of the Interstate Commerce Commission. The more important question relates directly to whether the Interstate Commerce Commission, a quasi-judicial body, may institute investigations of a private carrier, under Section 204(c) of the Interstate Commerce Act on any subject other than qualifications and maximum hours of service of employees, and standards of equipment in view of the restriction placed upon the Interstate Commerce Commission by Congress with respect to the Commission's limited authorty over private carriers as expressly set forth in Section 204(a)(3) of the Interstate Commerce Act, supra.

The undersigned counsel respectfully represents that the questions raised on this appeal have arisen because of an er-

roneous interpretation of the provisions of the aforesaid sections of the Interstate Commerce Act. It is further represented to the Court that these questions present substantial issues of law which have not previously been the subject of judicial determination by an appellate court or by the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons, appellants submit that this Court has jurisdiction over the questions raised in this appeal and that the rights of the parties require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

FRANCIS J. ORTMAN

1366 National Press Building
Washintgon 4, D. C.

Attorney for Appellants

Appendix A

Decided June 6, 1958

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SALVATORE TERRITO, CHARLES TERRITO and VINCENT TERRITO, a partnership, trading as TERRITO & SONS,
and
CALTER PETROLEUM CO., INC., a corporation
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

No. 1134-57
Civil Action

OPINION

BEFORE: HASTIE, *Circuit Judge;* SMITH and MEANEY, *District Judges.*

APPEARANCES:

For Plaintiffs:

For Defendant United States of America:
VICTOR R. HANSEN, ESQUIRE
Assistant Attorney General
CHESTER A. WEIDENBURNER, ESQUIRE
United States Attorney
JAMES E. KILDAY, ESQUIRE
Special Assistant to Attorney General
JOHN H. D. WIGGER, ESQUIRE
Special Assistant to Attorney General
For Defendant Interstate Commerce Commission:
ROBERT W. GINNANE, ESQUIRE
General Counsel
JAMES Y. PIPER, ESQUIRE
Assistant General Counsel

HASTIE, *Circuit Judge*.

The facts essential to the disposition of this case are not in dispute. They consist of little more than the procedural history of two matters before the Interstate Commerce Commission.

Acting on its own initiative, the Interstate Commerce Commission, by orders dated October 3, 1956, formally instituted two administrative proceedings. The one, at Docket No. MC-C-2039, was entitled "Territo & Sons, a partnership, — Investigation of Operations". The other, at Docket No. MC-C-2040, was entitled "Calter Petroleum Co., Inc. — Investigation of Operations". These proceedings, the consolidation of which was directed, purported, as appears in the initiating orders, to be issued under authority of Section 204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c), to determine whether Territo and Calter were operating as common carriers without complying with the Act and, if they should be so operating, to take steps appropriate to stop or correct such illegal activity. Preliminary objections of Territo and Calter challenging the entire procedure resulted in Commission orders overruling the objections and directing that the investigations proceed to hearing.

At that stage of the administrative proceeding Territo and Calter filed this law suit asking that a statutory district court be convened and that it enjoin the Commission from carrying out its original and supplementary orders directing that the above described investigations proceed.

Thus, this suit was filed before the Commission made any factual finding or reached any conclusion concerning the nature or legality of the plaintiffs' activities. These plaintiffs are attempting to establish, in anticipation of the event, that the Commission has no legal power under Section 204 even to investigate their activities. They argue that this section of the Act empowers investigation only of carriers actually operating under certificates of necessity and convenience.[1] It is admitted that Territo and Calter have no

certificates. In these circumstances it is urged that this court has authority to inquire, before the investigation occurs, whether an investigation of these carriers is within the jurisdiction of the Commission and, if the plaintiffs' legal postion is sustained, to enjoin the Commission from conducting the pending investigation.

We think it clear that the Commission has not yet taken any action or entered any order that this Court can review. The Commission has decided nothing and ordered nothing except that an investigation shall be instituted and shall proceed. In this area a three judge district court is a special statutory tribunal empowered to entertain complaints about administrative orders which are dispositive of some matter of substance which has come before the Commission. It has long been held, both in cases involving the Interstate Commerce Commission and in cases of other administrative agencies, that orders which merely direct that a matter proceed to hearing and administrative decision and do not require a party to take or refrain from taking any substantive action are not reviewable. *United States* v. *Illinois Central Ry.*, 1917, 244 U.S. 82; *Federal Power Commission* v. *Metropolitan Edison Co.*, 1938, 304 U.S. 375; *John J. Casale, Inc.* v. *United States*, D. Del., 1943, 52 F. Supp. 1005. And see the rationalization of this position in *Rochester Telephone Corp.* v. *United States*, 1939, 307 U.S. 125, 130-131. But, plaintiffs argue, such a restriction on judicial intervention at a preliminary stage of the administrative proceeding leaves an ag-

---

[1] Section 204 reads in part as follows:

"(c) Upon . . . its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith." 49 U.S.C. §304(c).

grieved party without remedy from the harassment and any other injury that may be incidental to defending itself in a proceeding that may be both groundless and beyond administrative authority. The answer is twofold. To an extent this burden is inherent in orderly procedure involving tribunals of first instance and reviewing bodies. However, in the extreme case where it clearly appears — and we do not suggest that it does here — that a public agency has acted arbitrarily or without color of authority, the extraordinary writs of mandamus and prohibition are likely to be available in a court which can exercise personal jurisdiction over the wrongdoing officials. But whether such a remedy might be available in some tribunal in the District of Columbia in this type of controversy is beside the point. We have here an attempt to raise in a statutory three judge court in advance of administrative action a question of administrative jurisdiction which such a court is competent to consider only if and after decision shall have gone against the aggrieved parties on the merits in the administrative tribunal. We emphasize that jurisdictional questions like all others can be preserved for review at that time. But the matter is clearly not ripe for judicial intervention now.

Judgment will be entered dismissing the complaint for want of jurisdiction.

WILLIAM H. HASTIE
Circuit Judge

WILLIAM F. SMITH
District Judge

THOMAS F. MEANEY
District Judge

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FILED
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No. 454

In the Supreme Court of the United States

OCTOBER TERM, 1958

SALVATORE TERRITO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

ROBERT W. GIBBANS,
General Counsel,
JAMES A. MURRAY,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is an appeal from the final judgment entered by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing an action brought by appellants to set aside Interstate Commission orders instituting two separate investigation proceedings for the purpose of determining, after hearing, the proper status of the appellants under Part II of the Interstate Commerce Act as either

motor carriers for hire or private carriers of property by motor vehicles.

By orders dated October 3, 1956 (copies attached as Appendices A and B, *infra,* pp. 6–9), Division 1 of the Commission, on its own initiative, instituted two investigation proceedings under Section 204 (c) of the Interstate Commerce Act, 49 U. S. C. 304 (c), for the purpose of determining whether appellants' motor carriers operations were, on the one hand, those of common or contract carriers of property by motor vehicle or, on the other, those of private carriers. If the operations are those of a private carrier, appellants are subject to the Interstate Commerce Act only with respect to safety of operations, maximum hours of service of employees, and standards of equipment. If the operations are those of a common or contract motor carrier, they are subject to various other requirements of the Act.

If the Commission finds, as a result of the investigation proceedings, that appellants' operations are being performed as common or contract carriers of property, the Commission may issue orders requiring them to cease and desist from such operations until such time as appellants obtain from the Commission appropriate certificates or permits as required by Sections 206 (a) (1), 209 (a) (1), and 203 (c) of the Act, 49 U. S. C. 306 (a) (1), 309 (a) (1), and 303 (c). Any order so issued would, of course, be subject to review in the courts. But if the Commission finds that appellants are private carriers of property by motor vehicle, as defined in Section 203 (a) (17) of the Act,

49 U. S. C. 303 (a) (17), the Commission would discontinue the investigation proceedings.

The three-judge district court unanimously held that the orders instituting the investigation proceedings are not reviewable and dismissed the complaint.

ARGUMENT

Appellants assert that they are private carriers under the Interstate Commerce Act and not common or contract carriers; that the Commission's jurisdiction over private carriers extends only to matters pertaining to safety of operation, hours of service of employees, and standards of equipment; and that, since the Commission's investigation of appellants did not relate to such matters, it was not authorized by the statute. But the Commission has done nothing more than to decide that there is sufficient cause for an investigation and determination of the question whether appellants' operations bring them within the statutory definition of a private carrier or within the statutory definition of a contract or common carrier. For this purpose, it issued the two orders as notices to appellants that a hearing would be scheduled at which the Commission's Bureau of Inquiry would offer evidence on the issue.

Although these notices are styled "orders," they do not require appellants to do or refrain from doing anything. Insofar as appellants are concerned, they are merely given notice of the proceedings so that they may, if they desire, participate therein, cross-examine witnesses, offer evidence, and be heard generally on the issues. If the Commission's decision

should be adverse to appellants or either of them, its order or orders will be subject to judicial review.

This Court has consistently refused judicial review of preliminary or procedural orders issued under the Interstate Commerce Act and like statutes. In *United States* v. *Illinois Central R. Co.,* 244 U. S. 82, the railroad sought to have set aside an order of the Commission setting for hearing complaints of certain coal mines seeking reparation for failure to furnish coal cars for loading. The railroad contended that the Commission had no jurisdiction to award damages in the cases presented. This Court held that there had been no "order" which is within the purview of the Urgent Deficiencies Act, and that the railroad's suit should therefore be dismissed. See also *John J. Casale, Inc.* v. *United States,* 52 F. Supp. 1005 (D. Del.), affirmed, 321 U. S. 752.

In *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, the Federal Power Commission had issued an order requiring certain public utilities to appear at a hearing and produce certain documents, and the utilities sought to have the Commission enjoined until it had passed upon their claims that they were not subject to the Federal Power Act and that the hearing was for a purpose not authorized by the Act. This Court, citing the *Illinois Central* case and numerous other decisions as to the reviewability of orders of the Interstate Commerce Commission, held that the statute authorized review only of "orders of a definitive character dealing with the merits of a proceeding" and did not embrace "mere preliminary or procedural orders". 304 U. S. at 384–385. The Court

also said (304 U. S. at 385): "So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration."

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

ROBERT W. GINNANE,
General Counsel,

JAMES A. MURRAY,
Associate General Counsel,
Interstate Commerce Commission.

NOVEMBER 1958.

APPENDIX A

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 3rd day of October, 1956.

No. MC–C–2039

TERRITO & SONS, A PARTNERSHIP—INVESTIGATION OF OPERATIONS

It appearing, That there is reason to believe that Territo & Sons, a partnership, composed of Salvatore Territo, Charles Territo, and Vincent Territo, with headquarters at 36–46 Straight Street, Paterson, New Jersey, has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act;

It further appearing, That there is not in force a certificate of public convenience and necessity or a permit issued by this Commission authorizing said Territo & Sons to engage in operations as a common or contract carrier; and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby, instituted under Section 204 (c) of said Act, into and concerning the motor carrier operations of said Territo & Sons, with a view to determining whether it has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by mo-

tor vehicle, in violation of Section 206 (a) (1) or 209 (a) (1) of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant;

It is further ordered, That Territo & Sons, a partnership, Salvatore Territo. Charles Territo and Vincent Territo, all of 36–46 Straight Street, Paterson, New Jersey, be, and they are hereby, made respondents in this proceeding;

It is further ordered, That this matter be assigned for hearing at a time and place to be fixed and on a consolidated record with the proceeding in MC–C–2040, Calter Petroleum Co., Inc.—Investigation of Operations;

It is further ordered, That the Bureau of Inquiry and Compliance shall give timely notice to the respondents prior to the hearing to be held herein with respect to the particular operations alleged to have been performed in violation of said Sections 206 (a) (1) and 209 (a) (1) of said Act;

And it is further ordered, That a copy of this order be served upon said respondent and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 1.

[SEAL] HAROLD D. McCOY,
Secretary.

APPENDIX B

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 3rd day of October, 1956.

No. MC–C–2040

CALTER PETROLEUM CO., INC.—INVESTIGATION OF OPERATIONS

It appearing, That there is reason to believe that Calter Petroleum Co., Inc., with headquarters at 36–46 Straight Street, Paterson, New Jersey, has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act;

It further appearing, That there is not in force a certificate of public convenience and necessity or a permit issued by this Commission authorizing said Calter Petroleum Co., Inc. to engage in operations as a common or contract carrier; and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby instituted under Section 204 (c) of said Act, into and concerning the motor carrier operations of said Calter Petroleum Co., Inc., with a view to determining whether it has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of Section 206

(a) (1) or 209 (a) (1) of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant;

It is further ordered, That Calter Petroleum Co., Inc., Charles Territo, Vincent Territo, Joseph Territo, and James Calderio, all of 36–46 Straight Street, Paterson, New Jersey, be, and they are hereby, made respondents in this proceeding;

It is further ordered, That this matter be assigned for hearing at a time and place to be fixed and on a consolidated record with the proceeding in MC–C–2039, Territo & Sons, a partnership,—Investigation of Operations;

It is further ordered, That the Bureau of Inquiry and Compliance shall give timely notice to the respondents prior to the hearing to be held herein with respect to the particular operations alleged to have been performed in violations of said Sections 206 (a) (1) and 209 (a) (1) of said Act;

And it is further ordered, That a copy of this order be served upon said respondent and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 1.

[SEAL] HAROLD D. MCCOY,
Secretary.

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SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO
A Partnership, Trading as Territo & Sons
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Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 15, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, Appellants Salvatore Territo, et al., are filing this Brief in Opposition to Motion to Affirm and respectfully represent that the questions on which the decision of the cause depends are substantial so as to need further argument.

STATEMENT

This brief is in opposition to the Motion to Affirm the judgment and final order of the United States District Court for the District of New Jersey which was entered on June 6, 1958, in the case of *Salvatore Territo, et al.* v. *United States of America and Interstate Commerce Commission* in Civil Action No. 1134-57. Said Motion to Affirm has been filed in behalf of the United States of America and the Interstate Commerce Commission, appellees, wherein said appellees agree with appellants that this case involves an appeal from the final judgment entered by the three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2285.

The three-judge statutory court did not dismiss the complaint on its merits but entered judgment dismissing the complaint for want of jurisdiction.

The orders dated October 3, 1956 (copies of which are attached as appendices A and B to the Motion to Affirm, pp. 6-9) were entered by Division 1 of the Interstate Commerce Commission, on its own initiative, but without formal complaint, whereby the Commisison instituted two investigation proceedings under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), with a view to determining whether appellants have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of Section 206(a)(1) or 209 (a)(1) of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant.

The important question which this Court is requested to decide relates directly to whether the Interstate Commerce Commission, a quasi-judicial body, may institute investigations of private carriers under Section 204(c) of the Interstate Commerce Act on any subject other than qualifications and maximum hours of service of employees, and standards of equipment, in view of the restriction placed upon the Inter-

state Commerce Commission by Congress. The Commission's limited authority over private carriers is expressly set forth in Section 204(a)(3) of the Interstate Commerce Act which is set forth in full at pages 4-5 of our Jurisdictional Statement. At page 7 of the Jurisdictional Statement the statement was made that: "It is further represented to the Court that these questions present substantial issues of law which have not previously been the subject of judicial determination by an appellate court or by the Supreme Court of the United States." The Motion to Affirm does not dispute the above quoted allegation of the appellants but contains references to prior decisions of this Court which do not, in any way, involve the important question as to whether the Interstate Commerce Commission exceeded its statutory authority in instituting the investigations by its orders of October 3, 1956, *supra*.

ARGUMENT

The basic error committed by the three-judge statutory court in its judgment and order entered June 6, 1958, and the basic error which is re-argued by the appellees in their Motion to Affirm may be pinpointed by referring to that portion of the opinion of the three-judge statutory court which reads:

> "It has long been held, both in cases involving the Interstate Commerce Commission and in cases of other administrative agencies, that orders which merely direct that a matter proceed to hearing and administrative decision and do not require a party to take or refrain from taking any substantive action are not reviewable." (Jurisdictional Statement, p. 10).

Except for the decision of the Supreme Court of the United States in the case of *Rochester Telephone Corp.* v. *United States*, 1939, 307 U.S., 125, 130-131, the appellees rely upon

the same cases which were relied upon by the three-judge statutory court.

None of the cited cases have any relationship to the direct question raised by this appeal.

Section 204(c) of the Interstate Commerce Act, which is the statute relied upon by the appellees as the authority of the Commission to institute the investigations referred to herein, was not enacted into law until August 9, 1935, which was some 18 years following the May 21, 1917 opinion of the Supreme Court of the United States in the case of *United States* v. *Illinois Central R. Co.*, 244 U.S. 82.

None of the cited cases have any bearing whatsoever on the statutory authority of the Interstate Commerce Commission to institute investigations of private carriers under Secion 204(c), nor do any of the cited cases relate to the extent of the authority vested in the Interstate Commerce Commission under the provisions of said Section 204(c) of the Interstate Commerce Act.

Appellees assert that the Commission has done nothing more than to decide that there is sufficient cause for an investigation and determination of the question whether appellants' operations bring them within the statutory definition of a private carrier or within the statutory definition of a contract or common carrier. Appellees further contend that the orders of October 3, 1956, which were entered by the Commission instituting the above described investigation proceedings are only "notices" and that they do not require appellants to do or refrain from doing anything. Appellees further contend that appellants are merely given notice of the investigation proceedings so that they may, if they desire, participate therein, cross examine witnesses, offer evidence, and be heard generally on the issues. These contentions, which appear on page 3 of Appellees' Motion to Affirm, do not appear at any place in the orders of October 3, 1956, *supra*, which were the orders instituting said investigation proceedings.

It is fair to assume that the appellees' assertions referred to in the preceding paragraph were made as a result of a study of the cases cited in the opinion of the three-judge statutory court and in their Motion to Affirm. All of the cited cases, except the Casale case, were decided by this Court between 1917 and 1938.

A significant development occurred within the Interstate Commerce Commission concerning a respondent's obligation and responsibility in investigation proceedings when the Commission adopted its new set of General Rules of Practice Before The Commission on July 31, 1942, which became effective September 15, 1942. For the first time it adopted Rule 43 and Rule 74 which set forth the obligations and responsibilities of respondents in investigation proceedings. Since September 15, 1942, it has become perfectly clear that an order is required to institute investigations and such order is not to be interpreted as a notice. The 1942 rules require a respondent to open and close the hearing in an investigation proceeding. The examiner may vary the order of presentation but it is not mandatory upon him to do so. (Rule 74). The failure to comply would obviously place the respondent in the position of failing to comply with a rule of practice which was prescribed under authority of Sections 17, 204(a)(6), 205, 304(a) and 403(a) of the Interstate Commerce Act. (U. S. Code, title 49, secs. 17, 304(a)(6), 904a), and 1003(a).). Rules 43 and 74 of the General Rules of Practice of September 15, 1942, now appear as Rules 1.43 and 1.74 in the General Rules of Practice Before the Commission which became effective October 1, 1956, and which are presently in effect with the exception of a minor amendment to Rule 1.74 which became effective on March 1, 1957, namely, — "except at further hearings granted on petition the petitioner requesting further hearing shall open and close.

Each of the above referred to General Rules of Practice Before The Interstate Commerce Commission suggest the desirability, if not the necessity, to review the prior decisions

of this court concerning "orders" v. "notices" as well as the extent of the Commission's statutory authority to institute investigations on its own initiative without complaint.

Appellees appear to have overlooked Rule 1.43 and Rule 1.74 of the General Rules of Practice Before The Interstate Commerce Commission pertaining to investigations which read as follows:

Rule 1.43 "An order instituting an investigation will be served by the Commission upon respondents. If within a time period stated in that order a respondent fails to comply with any requirement specified therein respondent shall be deemed in default and to have waived any further hearing. Thereafter the investigation may be decided without further proceedings."

Rule 1.74 "Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Comimssion in the manner provided under modified or shortened procedure. In formal-complaint, application, and investigation proceedings complainant, applicant, and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

It follows, therefor, that the investigation proceedings instituted by the aforesaid orders of October 3, 1956, do place a most serious burden and responsibility upon the respondents who are the appellants herein. The above quoted pro-

visions of the General Rules of Practice Before The Commission are but two examples as to why the decisions cited in the judgment and order of the three-judge statutory court and in appellees' Motion to Affirm may not be considered as precedents upon which to base an opinion on the two substantial questions of law raised by this appeal.

Emphasis is placed by appellees on the decision of this Court in the Illinois Central case, *supra*. However, in the Illinois Central case this Court had before it on appeal a question relating to the Commission's jurisdiction over a further hearing upon the issue of reparation. This is clear from that portion of this Court's opinion which provides:

> "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion, — in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Proctor & G. Co.* v. *United States*,—one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree." (*United States* v. *Illinois Central R. Co.*, 244 U.S. 82, 89).

In the instant case no hearing has been held.

In its opinion, the three-judge statutory court attempts to rationalize its position with the opinion of the Supreme Court of the United States in *Rochester Telephone Corp.* v. *United States*, 1939, 307 U.S. 125, 130-131. Actually the opinion of this Court in the Rochester Telephone case contains a very clear expression of the law which supports our position on the present appeal. Specifically this Court stated, in its opinion, in the Rochester Telephone case as follows:

> "Even when resort to courts can be had to review the Commission's order, the range of issues open to review is narrow. *Only questions affecting* constitutional

> power, *statutory authority* and the basic pre-requisites of truth *can be raised.*" (italics supplied). *Rochester Telephone Corp.* v. *United States*, 1939, 307 U.S. 125, 139-140.

The question affecting the Commission's statutory authority to institute the investigations which is the primary question involved in this appeal was not before this Court for consideration in the Rochester Telephone case, *supra.*

As to the decision of this Court in the case of *Federal Power Commission* v. *Metropolitan Edison Co.*, (1938) 304 U.S. 375, appellees contend that this Court held that the statute authorized review only of "orders of a definitive character dealing with the merits of a proceeding" and did not embrace "mere preliminary or procedural orders." 304 U.S. 384-385. Appellees further quote from the decision of this Court in the Federal Power Commission case, *supra*, as follows:

> "So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. 304 U.S. 375, 385.

Two pertinent distinctions between the Federal Power Commission case, *supra*, and the present appeal are:

1. The order of the Federal Power Commission dated January 6, 1936, which instituted the investigation in that case was not before the court for review. The only matter before the court was a petition of respondents asking for a rule to show cause why the Commission should not be restrained from taking any steps in furtherance of the inquiry under the orders of January 6, 1936, or of January 26, 1937, until the petition for rehearing had been disposed of, and from introducing any evidence except that which was relevant to the questions raised by the petition for rehearing. This Court specifically stated:

> "There was no order of the Commission before the Circuit Court of Appeals for review. Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review has been made." 304 U.S. 375, 377.

In the present case the orders of the Interstate Commerce Commission dated October 3, 1956, which instituted investigation proceedings, were issued without the requisite statutory authority.

2. This Court stated, in its opinion, in the Federal Power Commission case, *supra*, that:

> "Section 307(c) (of the Federal Power Act) also provides that any person who wilfully fails or refuses to attend and testify, or produce books and papers, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and be subject to fine and imprisonment. The qualification that the refusal must be 'wilful' fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled." 304 U.S. 375, 387.

The qualification that refusal to attend a hearing and testify, or produce books and papers, must be "wilful" before a person may be guilty of a misdemeanor does not appear in the subpoena provisions of the Interstate Commerce Act. (See Section 205(d) and Section 12(2) and (3) of the Interstate Commerce Act.)

The Casale case cited by appellees does not involve a question of the Commission's authority to assume jurisdiction over any person or carrier. The latter case involves solely a complaint to set aside an order of the Interstate Commerce Commission which denied a motion of plaintiff for an unconditional dismissal of its grandfather application. The

plaintiff was voluntarily before the Commission as a party in an administrative proceeding and had not exhausted its administrative remedies before appealing to the courts for assistance. (*John J. Casale, Inc.* v. *United States*, 52 F. Supp. 1005, 1006, affirmed, 321 U. S. 752). It is quite clear that the initial question as to the Commission's statutory authority to assume jurisdiction in a particular type of case or investigation proceeding was not before the court in the Casale case. It is directly before this Court in the present appeal.

CONCLUSION

The Interstate Commerce Commission has deprived the Territo family and Calter Petroleum Co., Inc., of the basic rights granted to them by Congress when it restricted the jurisdiction of the Commission over private carriers in Section 204(a)(3) of the Interstate Commerce Act. Section 204(c) of the Interstate Commerce Act does not give the Commission any greater authority over private carriers than the clearly defined authority appearing in Section 204(a)(3) of the Interstate Commerce Act.

For the reasons set forth in our Jurisdictional Statement as supplemented by this Brief in Opposition to Motion to Affirm, it is respectfully submitted that this Court enter an appropriate order noting its jurisdiction of this appeal thereby denying appellee's Motion to Affirm.

Respectfully submitted,

Francis J. Ortman

FRANCIS J. ORTMAN
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Washington 4, D. C.
Attorney for Appellants

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Office Supreme Court, U.S.
FILED
DEC 22 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 454

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO
A Partnership, Trading as Territo & Sons
and
CALTER PETROLEUM CO., INC., A Corporation,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT CÓURT FOR THE DISTRICT COURT OF NEW JERSEY

SUPPLEMENT TO BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellants, through their attorney, respectfully submit this Supplement to Brief in Opposition To Motion To Affirm for the purpose of adding the following amendment to Rule 1.74 of the General Rules of Practice Before The Commission which amendment became effective May 8, 1958; said Rule 1.74 having been incorrectly quoted on page 6 of the Brief referred to above.

The amendment of May 8, 1958, changed the period at the end of the second sentence to a semi-colon, and added the following:

> and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent.

Rule 1.74, including the amendment of May 8, 1958, now reads as follows:

> "Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Commission in the manner provided under modified or shortened procedure. In formal-complaint, application, and investigation proceedings complainant, applicant, and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close; and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

The omission of the amendment of May 8, 1958, to Rule 1.74 as quoted on page 6 of appellants' brief was brought to the attention of the undersigned attorney by the Associate General Counsel of the Interstate Commerce Commission and was not an intentional omission as the undersigned attorney had no knowledge of the amendment until it was brought to his attention after the brief had been filed.

It is represented that the addition of the amendment, at this time, will not affect the argument in the brief because the

rule, as amended, does not, per se, preclude the Bureau of Inquiry and Compliance of the Commission from calling one or more of the respondents or a representative of respondents as a witness or witnesses in the presentation of its direct case.

It is respectfully requested that this supplement be accepted in order that the complete text of Rule 1.74 of the General Rules of Practice Before The Commission may be before this Court at the time of its deliberation on the motion to Affirm and on the Brief In Opposition to Motion to Affirm.

Respectfully submitted,

FRANCIS J. ORTMAN
1366 National Press Building,
Washington 4, D. C.
Attorney for Appellants

Office-Supreme Court, U.S.
FILED
MAR 11 1959
JAMES R. BROWNING, Clerk

No. 454

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Appellants

v.

UNITED STATES OF AMERICA and
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Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO RECALL JUDGMENT OF THE SUPREME COURT OF THE UNITED STATES AND TO REINSTATE APPEAL

FRANCIS J. ORTMAN
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Washington 4, D. C.
Attorney for Appellants.

IN THE

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OCTOBER TERM, 1958

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Appellants

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UNITED STATES OF AMERICA and
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Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO RECALL JUDGMENT OF THE SUPREME COURT OF THE UNITED STATES AND TO REINSTATE APPEAL

The Appellants respectfully move the Court to set aside its *per curiam* decision of January 12, 1959, which dismissed the appeal in this case for the reason that the notice thereof was not filed within the time provided by law.

It is assumed that the *per curiam* decision of January 12, 1959, was based upon that portion of 28 U.S.C.A. 2101 (b) which provides that: "Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

It is now realized that the 60-day period within which the appeal should have been filed actually expired on August 5, 1958, or one day before August 6, 1958, the date on which the appeal was actually filed.

Appellants Suggest That Appeal Would Have Been Timely if Filed by August 10, 1958

The notice of appeal in this case was directed to the final judgment of the three-judge statutory court of the United States District Court for the District of New Jersey entered June 6, 1958. However, our attention has now been directed to the fact that the judgment entered by the Court on June 6, 1958, was opened by the Court for the purpose of entering a new and final order under date of June 11, 1958, which new order provided as follows:

> "Ordered, that that portion of the judgment entered on June 6, 1958, allowing costs be vacated and set aside."

A photostatic copy of the final order of June 11, 1958, in Civil Action No. 1134-57 in the United States District Court for the District of New Jersey, is attached hereto as Appendix A. Accordingly, it is respectfully submitted that the notice of appeal filed August 6, 1958, was well within the 60-day period provided for in 28 U.S.C.A. 2101 (b).

Notice of Judgment of June 6, 1958 Was Not Served Upon the Parties as Required by Rule 77 (d) of the Federal Rules of Civil Procedure

As an officer of this Court, the undersigned respectfully avers that the Clerk of the United States District Court for the District of New Jersey did not serve notice of the entry of the judgment of June 6, 1958, nor of the final order of June 11, 1958, in Civil Action No. 1134-57 upon the parties affected thereby as required by Rule 77 (d) of the Federal Rules of Civil Procedure. The fact is that the undersigned attorney was first informed of the entry of the June 6, 1958, judgment on June 23, 1958. After making inquiry of the Assistant General Counsel of the Interstate Commerce Commission, the undersigned attorney was informed that the Interstate Commerce Commission did not receive notice of the entry of the judgment of June 6, 1958, until June 19, 1958. These facts are further substantiated by Appendix B attached hereto, which is a photostatic copy of the entry by the Clerk of the Lower Court concerning Defendant's costs. It will be noted that this document was served only upon the U. S. Attorney and Peter J. Cammarano, Esq., who was New Jersey counsel for the Appellants. A copy of such entry was admittedly not served upon the Interstate Commerce Commission nor upon the undersigned attorney who was a party of record in the case before the three-judge statutory court of the United States District Court for the District of New Jersey.

No objection was made as to the filing of the notice of appeal by either the United States of America nor by the Interstate Commerce Commission. The jurisdictional statement was received by the Supreme Court of the United States together with the Government's Motion to Affirm and the Brief of Appellants in Opposition to Motion to Affirm. Insofar as the Appellants have been able to ascertain, the Government does not object to having the appeal considered as

having been timely filed. It is, therefore, requested that the Court grant this Motion in accordance with the apparent discretionary powers vested in the Court under the provisions of Rules 77 (d) and 73 (a) of the Federal Rules of Civil Procedure.

CONCLUSION

In view of the circumstances referred to herein, it is respectfully requested that the Court recall its judgment entered herein on January 12, 1959, and reinstate the appeal from the final order of the three-judge statutory court of the United States District Court for the District of New Jersey.

The ultimate disposition of this case is of primary importance to the Appellants. The fact is that no apparent jurisdictional determination has ever been made on the question as to whether the Interstate Commerce Commission may institute an investigation of private carriers under Section 204(c) of the Interstate Commerce Act when such investigation pertains to matters other than the qualifications and maximum hours of service of employees, and standards of equipment.

Respectfully submitted,

FRANCIS J. ORTMAN
1366 National Press Building
Washington 4, D. C.
Attorney for Appellants.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL #1134-57
ORDER

SALVATORE TERRITO, CHARLES TERRITO and VINCENT TERRITO, a partnership, trading as Territo & Sons and CALTER PETROLEUM CO., INC.,

Plaintiffs

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,

Defendants

This matter being opened to the Court by the Clerk of the United States District Court for the District of New Jersey, and it appearing that a judgment of the Court was entered on the docket on June 6th, 1958, with costs,

And it further appearing that said judgment was inadvertantly entered with costs,

It is, on this 11th day of June, 1958,

ORDERED that that portion of the judgment entered on June 6th, 1958, allowing costs be vacated and set aside.

(Signed) WILLIAM T. SMITH
Judge, U.S.D.C.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil 1134-57

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO, a partnership, trading as Territo & Sons and CALTER PETROLEUM CO., INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

To: U. S. Attorney
Peter J. Cammarano, Esq.

DEFENDANT'S COSTS

Docket Fee $20.00

Defendant's costs taxed in the sum of Twenty Dollars.

Dated: June 6, 1958

Newark, N. J.

Michael Keller, Jr.,
Clerk
By
(Signed) Minnie M. Spalletta
Deputy Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 11
JAMES R. BROWNING, Clerk

No. 454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO
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v.

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Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO RECALL JUDGMENT OF THE SUPREME COURT OF THE UNITED STATES AND TO REINSTATE APPEAL

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Attorney for Appellants.

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The Appellants respectfully move the Court to set aside its *per curiam* decision of January 12, 1959, which dismissed the appeal in this case for the reason that the notice thereof was not filed within the time provided by law.

It is assumed that the *per curiam* decision of January 12, 1959, was based upon that portion of 28 U.S.C.A. 2101 (b) which provides that: "Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

It is now realized that the 60-day period within which the appeal should have been filed actually expired on August 5, 1958, or one day before August 6, 1958, the date on which the appeal was actually filed.

Appellants Suggest That Appeal Would Have Been Timely if Filed by August 10, 1958

The notice of appeal in this case was directed to the final judgment of the three-judge statutory court of the United States District Court for the District of New Jersey entered June 6, 1958. However, our attention has now been directed to the fact that the judgment entered by the Court on June 6, 1958, was opened by the Court for the purpose of entering a new and final order under date of June 11, 1958, which new order provided as follows:

> "Ordered, that that portion of the judgment entered on June 6, 1958, allowing costs be vacated and set aside."

A photostatic copy of the final order of June 11, 1958, in Civil Action No. 1134-57 in the United States District Court for the District of New Jersey, is attached hereto as Appendix A. Accordingly, it is respectfully submitted that the notice of appeal filed August 6, 1958, was well within the 60-day period provided for in 28 U.S.C.A. 2101 (b).

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having been timely filed. It is, therefore, requested that the Court grant this Motion in accordance with the apparent discretionary powers vested in the Court under the provisions of Rules 77 (d) and 73 (a) of the Federal Rules of Civil Procedure.

CONCLUSION

In view of the circumstances referred to herein, it is respectfully requested that the Court recall its judgment entered herein on January 12, 1959, and reinstate the appeal from the final order of the three-judge statutory court of the United States District Court for the District of New Jersey.

The ultimate disposition of this case is of primary importance to the Appellants. The fact is that no apparent jurisdictional determination has ever been made on the question as to whether the Interstate Commerce Commission may institute an investigation of private carriers under Section 204(c) of the Interstate Commerce Act when such investigation pertains to matters other than the qualifications and maximum hours of service of employees, and standards of equipment.

Respectfully submitted,

FRANCIS J. ORTMAN
1366 National Press Building
Washington 4, D. C.
Attorney for Appellants.

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FOR THE DISTRICT OF NEW JERSEY

CIVIL #1134-57
ORDER

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Judge, U.S.D.C.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil 1134-57

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

To: U. S. Attorney
Peter J. Cammarano, Esq.

DEFENDANT'S COSTS

Docket Fee $20.00

Defendant's costs taxed in the sum of Twenty Dollars.

Dated: June 6, 1958

Newark, N. J.

Michael Keller, Jr.
Clerk
By
(Signed) Minnie M. Spalletta
Deputy Clerk